IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.BALAKRISHNAN NAIR
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

TUESDAY, THE 23RD OCTOBER 2007 / 1ST KARTHIKA 1929

WP(C).No. 24627 of 2007(F)

PETITIONER:

THILAKAN, AGED 44 YEARS,
S/O. KANDA, KOTTIKKAL HOUSE,
MULANGU, THITTIPPAL, THRISSUR.

BY ADV. SRI.V.M.KRISHNAKUMAR

RESPONDENTS:
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1. THE CIRCLE INSPECTOR OF POLICE,
CHERPU POLICE STATION,THRISSUR DT.

2. THE SUB INSPECTOR OF POLICE,
CHERPU POLICE STATION,THRISSUR DT.

3. MADHUSOODANAN,
S/O. PAPPAIKUTTY,
CHERUSSERI WARRIAM,
THAIKKATTUSSERI.P.O,THRISSUR .

4. RAMESAN,
KUNNATHCHERALIYIL HOUSE,
THAIKKATTUSSERY.P.O., THRISSUR.

ADDL. RESPONDENT:

5. VALLACHIRA GRAMA PANCHAYAT, VALLACHIRA,
THRISSUR, REPRESENTED BY SECRETARY.

(ADDL.R5 IS IMPLEADED AS PER ORDER DATED 6.9.07 IN IA NO.11887/07}

BY ADV. SRI.P.SANTHOSH (PODUVAL) - R3
SMT.R.RAJITHA
GOVERNMENT PLEADER SRI.P.A.SALIM – R1 & R2
SRI.M.B.PRAJITH - R5

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 08/10/2007, THE COURT ON THE 23.10.2007 DELIVERED THE FOLLOWING:

APPENDIX (WPC NO.24627/2007)

PETITIONER'S EXTS.

EXT.P1 - TRUE COPY OF AGREEMENT DATED 2.3.2007.

EXT.P2 - TRUE COPY OF LETTER OF THE GEOLOGIST DATED 19.04.05.

EXT.P3 - TRUE COPY OF REPRESENTATION FILED BY THE PETITIONER DATED 26.07.07.

EXT.P4 - TRUE COPY OF THE NOTIFICATION ISSUED BY THE GOVERNMENT DATED 23.12.1977.

EXT.P5 - TRUE COPY OF THE ORDER IN W.P.(C) NO.34451/06 DATED 12.1.07.

3RD RESPONDENT'S EXTS.

EXT.R3(a) SERIES – PHOTOGRAPHS SHOWING THE LIE OF CERTAIN AREAS WHICH HAVE BEEN SUBJECTED TO SUCH EXCAVATIONS.

EXT.R3(b) - TRUE COPY OF DECISION DATED 4.12.2004 TAKEN BY THE VALLACHIRA GRAMA PANCHAYAT.

EXT.R3(c) - TRUE COPY OF DECISION OF VALLACHIRA GRAMA PANCHAYAT DATED 5.12.2005.

EXT.R3(d) – TRUE COPY OF MASS PETITION PREFERRED BEFORE THE REVENUE DIVISIONAL OFFICER, THRISSUR BY SEVERAL RESIDENTS OF WARD NO.1 OF VALLACHIRA PANCHAYAT INCLUDING THE 3RD RESPONDENT.

2ND RESPONDENT'S EXTS.

ANNEXURE R2(a) – THE PANCHAYAT DECISION DATED 5.12.2005.

/TRUE COPY/

K.BALAKRISHNAN NAIR &

T.R.RAMACHANDRAN NAIR, JJ.

W.P.(C) NO. 24627 OF 2007-F

Dated 23rd October, 2007.

JUDGMENT

Balakrishnan Nair, J.

Though, this is one of the run-of-the-mill police protection cases being filed every day before this Court, it throws up certain questions relating to environmental protection. The main point that arises for decision is whether the police should stand guard against the protesters when the petitioner removes ordinary earth from a plot of land in a remote village, on the strength of an agreement entered into by him with the owner of the property.

2. The brief facts of the case are the following: The petitioner makes a living by engaging in the business of supplying ordinary earth for land filling in connection with various developmental activities. M/s.Goodway Business Corporation Limited own a plot of land having an extent of 91 cents in Re-survey No.62/2 of Vallachira Village in Vallachira Grama Panchayat, Thrissur district. The said Corporation by Ext.P1 agreement,

granted the right to cut and remove the trees standing in the said plot, to dismantle and take away the old building in the said property and also to remove the ordinary earth from the surface till the level of the said property reaches the road level, subject to payment of the amounts mentioned therein. On the strength of the agreement, the petitioner has already cut and removed the trees and dismantled the old building. When he started removing the upper soil, engaging workmen and using equipments like J.C.B., the people of the locality led by respondents 3 and 4 obstructed the same. The petitioner submits, ordinary earth does not come under the definition of minor mineral as per the notification issued under the Mines and Minerals (Regulation and Development) Act, 1957. In support of this submission, he relies on the communication issued by the Geologist of Ernakulam district to one Mr.K.K.Khaleel, a copy of which is produced as Ext.P2. Against the obstruction of the local people, the petitioner submits, he filed Ext.P3 representation dated 26.7.2007 before respondents 1 and 2, seeking police protection for removal of the ordinary earth from the aforementioned plot of land. When the police did not extend any helping hand, this writ petition is filed, seeking the following relief:

> "Issue a writ in the nature of mandamus commanding the respondents 1 and 2 to afford adequate and effective police protection to the petitioner for removing ordinary earth from

> Ext.P1 property in the event of any obstruction from respondents 3 and 4 and their men."

According to the petitioner, he has got every right to remove ordinary earth from the property mentioned in Ext.P1 agreement. In view of Ext.P2, the consent of the Geologist is not necessary for removal of ordinary earth. The inaction of the police to extend protection to him and his workmen, even after the receipt of Ext.P3 representation is illegal and arbitrary, it is submitted.

3. The 2nd respondent police officer has filed a statement, stating that the removal of earth is obstructed by the general public. The respondents 3 and 4, who are the owners of the nearby properties, are also among them. The Panchayat has taken a decision at its meeting held on 5.12.2005, to prevent illegal removal of earth. The resolution passed by it has been forwarded to the 2nd respondent also. The copy of that resolution received from the Panchayat is produced as Annexure-R2(a). The translation of Annexure-R2(a) reads as follows:

> "**Vallachira Grama Panchayat**
>
> Decision No.271/2005 of the ordinary meeting held on 5.12.2005:
>
> Several complaints have been received that as a result of unauthorised removal of earth, functioning of granite quarries, removal of soil from agricultural land and mining of sand in

> Vallachira Grama Panchayat area, the utility of agricultural land, availability of drinking water and the safety of the residential buildings have been adversely affected. The meeting of the Panchayat discussed in detail the above situation and to ensure the safety of the public, existence of agricultural land and availability of water, decided to prohibit unauthorised removal of earth, blasting of rocks and removal of sand from agricultural land. For the above activities, permission should be obtained in accordance with law from the Revenue Divisional Officer, the District Officer of Mining and Geology and Vallachira Grama Panchayat and resolved to request the Thrissur Revenue Divisional Officer, the Thrissur District Collector and the C.I of Police, Cherpu, to take necessary steps to prevent unauthorised removal of earth, blasting of rocks and mining of sand from agricultural land."

4. The 3rd respondent, who is one of the members of the local public, has filed a counter affidavit, denying all the allegations against him and the public that they are threatening and causing physical obstruction to the petitioner and his workers. He points out that on the strength of agreements similar to Ext.P1, large-scale excavation of land is taking place in Vallachira Panchayat, which even goes down up to a depth of 10 feet below the ground level. The 3rd respondent has produced Ext.R3(a) series photographs, showing the degradation of land as a result of removal of earth. It is further submitted that since the upper crust of the soil is removed, rain water retention is considerably reduced and there is drinking water scarcity in the area. The ground water is depleted. The wells and ponds have dried up. The local residents have voiced their concern and they

seek banning the removal of earth. Based on the protest, the Panchayat on 4.12.2004 passed a resolution to prohibit removal of earth from its area. The copy of that resolution is Ext.R3(b). Again, based on the complaints of the public, the Panchayat has taken a decision on 5.12.2005, as evident from Ext.R3(c) resolution. Ext.R3(c) and Annexure-R2(a) are one and the same. The 3rd respondent also submitted that a mass petition has been preferred by the residents of Ward No.I of Vallachira Grama Panchayat, including him before the Revenue Divisional Officer, Thrissur, complaining about the indiscriminate removal of earth. Ext.R3(d) is the mass petition. So, he prays for dismissal of the writ petition.

6. The 5th respondent Grama Panchayat has filed a counter affidavit, in which it is submitted that there are wide-spread complaints regarding removal of ordinary earth and sand illegally. So, the Panchayat has prohibited such activities. The excavation is sought to be made without the permission of the Panchayat. As a result of the unauthorised excavation of sand, there is acute scarcity of drinking water in the area, it is submitted.

7. The petitioner has filed a reply affidavit, in answer to the averments in the counter affidavit filed by the 3rd respondent. According to the petitioner, Ext.R3(c) resolution is unsustainable in law. For removal of ordinary earth, no licence from the Panchayat is necessary. He has also

produced Ext.P4 notification issued by the Government, which would show that ordinary earth is not a minor mineral. He also relies on Ext.P5 judgment of a single Judge of this Court, which permits excavation of sand from an agricultural land, subject to certain conditions stipulated therein.

8. We heard the learned counsel on both sides. Mr.V.M.Krishnakumar, learned counsel for the petitioner contended that the petitioner has got every right to remove the ordinary earth. For removing the same, no permission is required from the Panchayat or from the Geologist. So, when there is any obstruction from the part of the public, the police are bound to extend protection to the petitioner. In support of his submission, the learned counsel relied on the decision of the learned single Judge of this Court in **Sivadas v. Geologist, Mining and Geology Department** [2003(2) KLT 312].

9. The learned counsel for the 3rd respondent Mr. Santhosh P.Poduval submitted that the people of the locality have the right to have clean environment in their village. Their right in this regard is protected by their right to life, guaranteed under Article 21 of the Constitution of India. He pointed out that the indiscriminate mining of ordinary earth is causing environmental degradation in the area. Further, similar activities of

removal of ordinary sand etc., have affected the availability of drinking water also in the area. He also relied on the decision of this Court in **Soman v. Geologist** [2004(3) KLT 577]. He submitted that the said decision has been upheld by the Division Bench of this Court in **Biju Chacko v. Deputy Director, Mining and Geology** [2005(2) KLT SN 16, Case No.18]. Mr.M.B.Prajith, learned counsel appearing for the 5th respondent Panchayat and Mr.P.A.Salim, learned Government Pleader also supported the stand of the 3rd respondent and opposed the prayer of the petitioner for police protection.

10. From the materials produced in this writ petition, including Ext.R3(a) series photographs and the resolutions of the Panchayat, it is clear that large-scale mining of ordinary earth etc., is taking place in the Panchayat area and the people have started protesting against the same in public. So, the Panchayat, which represents the people of the locality, has woken up and passed Exts.R3(b) and R3(c) resolutions. Therefore, it can be safely presumed that the large-scale removal of earth has already taken its toll, which is manifested in the form of drinking water scarcity.

11. The point that arises for decision is whether this Constitutional Court should direct the police to help the petitioner to assert his private

right, ignoring the protest of the public and the Grama Panchayat. The petitioner may be right when he contends that there is no law prohibiting removal of ordinary earth. So, he does not require any clearance from the Panchayat or from the Geologist for removal of the same, provided the land in question was not one used for cultivating food crops and therefore, not covered by the provisions of the Kerala Land Utilisation Order, 1967. The definition of food crops includes paddy, vegetables, tapioca, pepper, banana, plantain etc. Let us assume that the petitioner's land is not covered by the provisions of the K.L.U. Order, though there is no pleading in the writ petition on this aspect. If the petitioner is conceded freedom to remove the upper crust of the soil in the property covered by Ext.P1, the same freedom must be conceded to every land owner in the Panchayat. If every one exercises that right, the result will be that the entire land in the Panchayat not covered by the K.L.U. Order, can be excavated and converted into huge pits with impunity. We feel that this Court should not turn a blind eye to such a probable eventuality. The people of the Panchayat have the right to have a decent environment, which is part of their fundamental right under Article 21 of the Constitution of India. No one can be conceded any unfettered freedom to excavate and degrade the land owned by him. It will have repercussions on the neighbouring land and its owners and the

eco-system of the area in general. No man can claim absolute right to indulge in activities resulting in environmental degradation in the land owned by him. In this context, we feel that it will be appropriate to refer to some of the decisions of the Hon'ble Supreme Court concerning environmental protection.

12. The Apex Court in **State of Tamil Nadu v. Hind Stone** [(1981)2 SCC 205] observed as follows:

> "6. Rivers, Forests, Minerals and such other resources constitute a nation's natural wealth. These resources are not to be frittered away and exhausted by any one generation. Every generation owes a duty to all succeeding generations to develop and conserve the natural resources of the nation in the best possible way. It is in the interest of mankind. It is in the interest of the nation."

Again the Apex Court in **Sachidanand Pandey v. State of W.B.** [(1987)2 SCC 295) held as follows:

> "3. Today society's interaction with nature is so extensive that the environmental question has assumed proportions affecting all humanity. Industrialisation, urbanisation, explosion of population, over-exploitation of resources, depletion of traditional sources of energy and raw materials and the search for new sources of energy and raw materials, the disruption of natural ecological balances, the destruction of a multitude of animal and plant species for economic reasons and sometimes for no good reason at all are factors which have contributed to environmental deterioration. While the scientific and technological progress of man has invested him with immense power over nature, it has also resulted in the unthinking use of the power, encroaching

> endlessly on nature. If man is able to transform deserts into oases, he is also leaving behind deserts in the place of oases. In the last century, a great German materialist philosopher warned mankind:
>
> > Let us not, however, flatter ourselves over much on account of our human victories over nature. For each such victory nature takes its revenge on us. Each victory, it is true, in the first place brings about the results we expected, but in the second and third places, it has quite different, unforeseen effects which only too often cancel the first." (Emphasis supplied)

The Apex Court in **M.C.Mehta v. Kamal Nath** [(1997)1 SCC 388] has quoted with approval the words of David B.Hunter on finiteness of natural resources in his article published in Harward Environmental Law Review Vol.12(1988) Page 311, which read as follows:

> "Another major ecological tenet is that the world is finite. The earth can support only so many people and only so much human activity before limits are reached. This lesson was driven home by the oil crisis of the 1970s as well as by the pesticide scare of the 1960s. The current deterioration of the ozone layer is another vivid example of the complex, unpredictable and potentially catastrophic effects posed by our disregard of the environmental limits to economic growth. The absolute finiteness of the environment, when coupled with human dependency on the environment, leads to the unquestionable result that human activities will at some point to be constrained.
>
> Human activity finds in the natural work its external limits. In short, the environment imposes constraints on our freedom; these constraints are not the product of value choices but of the scientific imperative of the environment's limitations. Reliance on improving technology can delay temporarily, but not forever, the inevitable constraints. There is a limit to the

> capacity of the environment to service.... growth, both in providing raw materials and in assimilating by-product wastes due to consumption. The largesse of technology can only postpone or disguise the inevitable."

13. The concept of sustainable development is now part of our environmental law, in view of various decisions of the Apex Court. The competing claims of the present generation for development and also the claims of future generations to inherit a healthy environment have to be balanced. While exploiting the resources, the capacity of the environment to repair and replace, has also to be taken note of. If a tree is cut and removed, for another tree to grow to the same size, it may take several years. If a bucket of soil is removed, to generate the same, the earth may take a few hundred years. The same is the case of other natural resources also. The length of time only varies. The revenge of mother earth has started displaying in the form of earth quakes, tsunamies, unusually wild cyclonic storms etc. Therefore, it is high time that we think of putting a stop to the defiling and degrading of mother earth.

14. One of the leading decisions of the Apex Court dealing with sustainable development and related principles is in **Vellore Citizens' Welfare Forum v. Union of India** [(1996)5 SCC 647]. The relevant portion of the said decision reads as follows:

"10. The traditional concept that development and ecology are opposed to each other is no longer acceptable. 'Sustainable Development' is the answer. In the international sphere, 'Sustainable Development' as a concept came to be known for the first time in the Stockholm Declaration of 1972. Thereafter, in 1987, the concept was given a definite shape by the World Commission on Environment and Development in its report called 'Our Common Future'. The Commission was chaired by the then Prime Minister of Norway, Ms. G.H.Brundtland and as such the report is popularly known as 'Brundtland Report'. In 1991 the Word Conservation Union, United Nations Environment Programme and Worldwide Fund for Nature, jointly came out with a document called 'Caring for the Earth', which is a strategy for sustainable living. Finally, came the Earth Summit held in June, 1992 at Rio, which saw the largest gathering of world leaders ever in the history—deliberating and chalking out a blueprint for the survival of the planet. Among the tangible achievements of the Rio Conference was the signing of two conventions, one on biological diversity and another on climate change. These conventions were signed by 153 nations. The delegates also approved by consensus three non-binding documents namely, a Statement on Forestry Principles, a declaration of principles on environmental policy and development initiatives and Agenda 21, a programme of action into the next century in areas like poverty, population and pollution. During the two decades from Stockholm to Rio, 'Sustainable Development' has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting ecosystems. 'Sustainable Development' as defined by the Brundtland Report means 'Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.' We have no hesitation in holding that 'Sustainable Development' as a balancing concept between ecology and development has been accepted as a part of the customary international law though its salient features have yet to be finalised by the international law jurists.

11. Some of the salient principles of 'Sustainable Development' as culled out from Brandtland Report and other international documents, are Inter-Generational Equity, Use and Conservation of Natural Resources, Environmental Protection, the Precautionary Principle, Polluter Pays Principle, Obligation to Assist and Co-operate, Eradication of Poverty and Financial Assistance to the developing countries. We are, however, of the view that 'The Precautionary Principle' and 'The Polluter Pays Principle' are essential features of 'Sustainable Development'. The 'Precautionary Principle' in the context of the municipal law—means:

(i) Environmental measures – by the State Government and the statutory authorities – must anticipate, prevent and attack the causes of environmental degradation.

(ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

(iii) The 'onus of proof' is on the actor or the developer/industrialist to show that his action is environmentally benign.

12. 'The Polluter Pays Principle' has been held to be a sound principle by this Court in *Indian Council for Enviro-Legal Action v. Union of India* [(1996)3 SCC 212]. The Court observed (SCC p.246, para 65).

'..... we are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country.'
The Court ruled that: (SCC p.246, para 65):

',,,,,,,, once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on.'

Consequently the polluting industries are 'absolutely' liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measure to remove sludge and other pollutants lying in the affected area. The 'Polluter Pays Principle' as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution, but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of 'Sustainable Development' and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

13. The Precautionary Principle and the Polluter Pays Principle have been accepted as part of the law of the land. Art.21 of the Constitution of India guarantees protection of life and personal liberty. Arts.47, 48A and 51A(g) of the Constitution are as under:

'47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health:-- The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

48A. Protection and improvement of environment and safeguarding of forests and wildlife:--The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.

51A(g) to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures.'

Apart from the constitutional mandate to protect and improve

the environment there are plenty of post-independence legislations on the subject but more relevant enactments for our purpose are: (1) The Water (Prevention and Control of Pollution) Act, 1974 (The Water Act), The Air (Prevention and Control of Pollution) Act, 1981 (The Air Act) and The Environment (Protection) Act,1986 (The Environment Act). The Water Act provides for the constitution of the Central Pollution Control Board by the Central Government and the constitution of the State Pollution Control Boards by various State Governments in the country. The Boards function under the control of the Governments concerned. The Water Act prohibits the use of streams and wells for disposal of polluting matters. It also provides for restrictions on outlets and discharge of effluents without obtaining consent from the Board. Prosecution and penalties have been provided which include sentence of imprisonment. The Air Act provides that the Central Pollution Control Board and the State Pollution Control Board constituted under the Water Act shall also perform the powers and functions under the Air Act. The main function of the Boards, under the Air Act, is to improve the quality of the air and to prevent, control and abate air pollution in the country. We shall deal with the Environment Act in the latter part of this judgment.

14. In view of the above mentioned constitutional and statutory provisions we have no hesitation in holding that the Precautionary Principle and the Polluter Pays Principle are part of the environmental law of the country.

15. Even otherwise once these principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law. It is almost an accepted proposition of law that the rules of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Court of Law. To support we may refer to Justice H.R.Khanna's opinion in *A.D.M. v. Shivakant Shukla* [(1976)2 SCC 521], *Jolly George Varghese* case [(1980)2 SCC 360] and *Gramaphone Co*. case

[(1984)2 SCC 534].” (Emphasis supplied)

In view of the above and other judgments, the concept of “sustainable development” and the doctrines of “polluter pays” and “precautionary principle” are now part of our environmental law. The Apex Court has repeatedly held that the right to life guaranteed under Article 21 of the Constitution of India includes the right to decent environment. See the decisions in **Shantistar Builders v. Narayan Khimalal** [(1990)1 SCC 520], **Virender Gaur v. State of Haryana** [(1995)2 SC 577], **Chamali Singh v. State of U.P.** [(1996)2 SCC 549], **State of M.P. v. Kedia Leather and Liquor Ltd.** [(2003)7 SCC 389], **M.D.Dayal v. Union of India** [(2004)9 SCC 362] and **T.N.Godavarman Thirumulpad v. Union of India** [(2006)1 SCC 1].

15. Environmental degradation was at all times a concern of mankind all over the world. In this context, we feel it apposite to quote the reply of the wise “Indian Chief of Seattle” to the offer of the great “White Chief in Washington” to buy their land, given in 1854. Chinnappa Reddy, J in **Sachidanand Pandey**'s case (supra) described the said reply in the following words:

> “The reply is profound. It is beautiful. It is timeless. It contains the wisdom of the ages. It is the first ever and the

> most understanding statement on environment. It is worth quoting. To abridge it or to quote extracts from it is to destroy its beauty. You cannot scratch a painting and not disminish its beauty."

With the above words, His Lordship quoted the Red Indian Chief's entire reply in that judgment. We feel that we should also do the same. We quote:

> "How can you buy or sell the sky, the warmth of the land? The idea is strange to us.
>
> If we do not own the freshness of the air and the sparkle of the water, how can you buy them?
>
> Every part of the earth is sacred to my people. Every shining pine needle, every sandy shore, every mist in the dark woods, every clearing and humming insect is holy in memory and experience of my people. The sap which courses through the trees carries the memories of the red man.
>
> The white man's dead forget the country of their birth when they go to walk among the stars. Our dead never forget this beautiful earth, for it is the mother of the red man. We are part of the earth and it is part of us. The perfumed flowers are our sisters; the horse, the great eagle, these are our brothers. The rocky crests, the juices in the meadows, the body heat of the pony, and man—all belong to the same family.
>
> So, when the Great Chief in Washington sends word that he wishes to buy our land, he asks much of us. The Great Chief sends word he will reserve us a place so that we can live comfortably to ourselves. He will be our father and we will be his children. So we will consider your offer to buy our land. But it will not be easy. For this land is sacred to us.
>
> This shining water moves in the streams and rivers is not just water but the blood of our ancestors. If we sell you land, you must remember that it is sacred and you must teach your

children that it is sacred and that each ghostly reflection in the clear water of the lakes tells of events and memories in the life of my people. The water's murmur is the voice of my father's father.

The rivers are our brothers, they quench our thirst. The rivers carry our canoes, and feed our children. If we sell you our land, you must remember, and teach your children, that the rivers are our brothers, and yours and you must henceforth give the kindness you would give any brother.

We know that the white man does not understand our ways. One portion of the land is the same to him as the next, for he is a stranger who comes in the night and takes from the land whatever he needs. The earth is not his brother but his enemy, and when he has conquered it, he moves on. He leaves his father's graves behind, and he does not care.

He kidnaps the earth from his children. His father's grave and his children's birthright are forgotten. He treats his mother, the earth, and his brother, the sky, as things to be bought, plundered, sold like sheep or bright breads. His appetite will devour the earth and leave behind only a desert.

I do not know. Our ways are different from your ways. The sight of your cities pains the eyes of the red man. But perhaps it is because the red man is a savage and does not understand.

There is no quiet place in the white man's cities. No place to hear the unfurling of leaves in spring, or the rustle of an insect's wings. But perhaps it is because I am a savage and do not understand. The clatter only seems to insult the ears. And what is there to life if a man cannot hear the lonely cry of the whippoorwill or the arguments of the frogs around a pond at night? I am a red man and do not understand. The Indian prefers the soft sound of the wind darting over the face of a pond, and the smell of the wind itself, cleansed by a midday rain, or scented with the pinon pine.

The air is precious to the red man, for all things share the same breath—the beast, the tree, the man, they all share the same breath. The white man does not seem to notice the air he breathes. Like a man dying for many days, he is numb to the stench. But if we sell you our land, you must remember that the air is precious to us, that the air shares its spirit with all the life it supports. The wind that gave our grandfather his first breath also receives the last sigh. And if we sell you our land, you must keep it apart and sacred as a place where even the white man can go to taste the wind that is sweetened by the meadow's flowers.

So we will consider your offer to buy our land. If we decide to accept, I will make one condition. The white man must treat the beasts of this land as his brothers.

I am a savage and I do not understand any other way. I have seen a thousand rotting buffaloes on the prairie, left by the white man who shot them from a passing train. I am a savage and I do not understand how the smoking iron horse can be more important than the buffalo that we kill only to stay alive.

What is man without the beasts? If all the beasts were gone, man would die from a great loneliness of spirit. For whatever happens to the beasts soon happens to man. All things are connected.

You must teach your children that the ground beneath their feet is the ashes of our grandfathers. So that they will respect the land. Tell your children that the earth is rich with the lives of our kin. Teach your children what we have taught our children, that the earth is our mother. Whatever befalls the earth befalls the sons of the earth. If men spit upon the ground, they spit upon themselves.

This we know: The earth does not belong to man; man belongs to the earth. This we know: All things are connected like the blood which unites one family. All things are

connected.

> Whatever befalls the earth befalls the sons of the earth. Man did not weave the web of life: he is merely a strand in it. Whatever he does to the web he does to himself.
>
> Even the white man, whose God walks and talks with him as friend to friend, cannot be exempt from the common destiny. We may be brothers after all. We shall see. One thing we know, which the white man may one day discover—our God is the same God. You may think now that you own Him as you wish to own our land; but you cannot. He is the God of man, and His compassion is equal for the red man and the white. This earth is precious to Him, and to harm the earth is to heap contempt on its Creator. The white too shall pass; perhaps sooner than all other tribes. Contaminate your bed and you will one night suffocate in your own waste.
>
> But in your perishing you will shine brightly, fired by the strength of the God who brought you to this land and for some special purpose gave you dominion over this land and over the red man. That destiny is a mystery to us, for we do not understand when the wild buffalo are all slaughtered, the wild horses are tamed, the secret corners of the forest heavy with scent of many men and the view of the ripe hills blotted by talking wires. Where is the thicket? Gone. Where is the eagle? Gone. The end of living and the beginning of survival."

16. One of our eminent poets Sri.O.N.V.Kurup, who is rightly described as the bard of the people, has sung a requiem to mother earth (ഭൂമിക്ക് ഒരു ചരമഗീത ം), describing the indiscriminate destruction of environment. The relevant portion of the said poem reads as follows:

“
.....
എണ്ണിയാൽ തീരാത്ത
തങ്ങളിലിണങ്ങാത്ത
സന്തതികളെ നൊന്തു പെറ്റു !
ഒന്നു മറ്റൊന്നിനെ കൊന്നുതിന്നുന്നത്
കണ്ണാലെ കണ്ടിട്ടുമൊരുവരുംകാണാതെ
കണ്ണീരൊഴുക്കി നീ നിന്നു!
പിന്നെ നിന്നെത്തന്നെയല്പാല്പമായ്ത്തിന്നു–
തിന്നവർ തിമർക്കവേ ഏതും വിലക്കാതെ
നിന്നു നീ സർവം സഹയായ് !
ഹരിതമൃദുകഞ്ചുകം തെല്ലൊന്നു നീക്കി നീ –
യരുളിയ മുലപ്പാൽ കുടിച്ചു തെഴുത്തവർ –
ക്കൊരു ദാഹമുണ്ടായ്: (ഒടുക്കത്തെദാഹം !)
തിരുഹൃദയരക്തം കുടിക്കാൻ !

ഇഷ്ടവധുവാം നിന്നെ സൂര്യനണിയിച്ചൊരാ
ചിത്രപടകഞ്ചുകം ചീന്തി,
നിൻ നഗ്നമേനിയിൽ നഖം താഴ്ത്തി, മുറിവുകളിൽ
നിന്നുതിരും ഉതിരമവർ മോന്തി
ആടിത്തിമിർക്കും തിമിർപ്പുകളിലെങ്ങെങ്ങു–
മാർത്തലക്കുന്നു മൃതിതാളം !

അറിയാതെ ജനനിയെപ്പരിണയിച്ചൊരു യവന –
തരുണന്റെ കഥയെത്ര പഴകീ !
പുതിയ കഥയെഴുതുന്നു വസുധയുടെ മക്കളിവർ
വസുധയുടെ വസ്ത്രമുരിയുന്നു!
വിപണികളിലവ വിറ്റുമോന്തുന്നു, വിടനഖര
മഴുമുനകൾ കേളി തുടരുന്നു !
കത്തുന്ന സൂര്യന്റെ കണ്ണുകളിൽ നിന്നഗ്നി
വർഷിച്ചു രോഷമുണരുന്നു !
ആടിമുകിൽമാല കുടിനീരു തിരയുന്നു;
ആതിരകൾ കുളിരു തിരയുന്നു;
ആവണികളൊരു കുഞ്ഞുപൂവു തിരയുന്നു;
ആറുകളൊഴുക്കു തിരയുന്നു!
സർഗലയതാളങ്ങൾ തെറ്റുന്നു, ജീവരഥ–
ചക്രങ്ങൾ ചാലിലുറയുന്നു!
ബോധമാം നിറനിലാവൊരു തുള്ളിയെങ്കിലും
ചേതനയിൽ ശേഷിക്കുവോളം
നിന്നിൽനിന്നുരുവായി
നിന്നിൽനിന്നുയിരാർന്നൊ–
രെന്നിൽ നിന്നോർമകൾ മാത്രം!

.....

മുണ്ഡിതശിരസ്കയായ് ഭ്രഷ്ടയായ് നീ സൗര–
മണ്ഡലപ്പെരുവഴിയിലൂടെ
മാനഭംഗത്തിന്റെ മാറാപ്പുമായി സ–
ന്താനപാപത്തിൻ വിഴുപ്പുമായി
പാതിയുമൊഴിഞ്ഞൊരു മനസ്സിലതീതീവ്രമാം
വേദനകൾതൻ ജ്വാല മാത്രമായി
പോകുമിപ്പോക്കിൽ സിരകളിലുടരി–
ച്ചേറുകയല്ലീ കരാളമൃത്യു ?.....

ഇനിയും മരിക്കാത്ത ഭൂമി?
ഇതു നിന്റെ മൃതിശാന്തി ഗീതം!
ഇതു നിന്റെ(എന്റെയും) ചരമശുശ്രൂഷയ്ക്കു
ഹൃദയത്തിലിന്നേ കുറിച്ച ഗീതം!
ഉയിരറ്റ നിൻ മുഖത്തശ്രുബിന്ദുക്കളാൽ
ഉദകം പകർന്നു വിലപിക്കാൻ
ഇവിടെയവശേഷിക്കയില്ല ഞാ, നാകയാൽ
ഇതുമാത്രമിവിടെയെഴുതുന്നു:
ഇനിയും മരിക്കാത്ത ഭൂമി! നിന്നാസന്ന–
മൃതിയിൽ നിനക്കാത്മശാന്തി!
മൃതിയിൽ നിനക്കമൃതശാന്തി!"

The translation of the above quoted portion of the poem reads as follows:

(From the publication of Sahitya Akademi, New Delhi)

*"**A Requiem to Mother Earth***

.....
You bore countless children
who cannot live in amity!
You saw them, with your own eyes,
eating one another.
You stood helpless,
shedding unseen silent tears!
Then, as they danced merrily,
eating you up slice by slice,
unprotesting, all-suffering,
you stood!
Parting your soft, green mantle,
you breast-fed them--
as they swelled, they developed
a strange thirst (their last!)--

a thirst for the blood
of your sacred heart!

O Mother, favourite bride of the sun,
you lost your sun-given bridal dress.
They tore it to shreds.
They clawed at your bare body
They sucked the gushing blood!
The rhythm of death
resounds every where,
as they swirl in their
frenzied dance!

The story of the Greek young man
who unwittingly married his mother is old.
They, the children of Mother Earth
who strip her naked,
are writing a new version
of the old story.
What they strip they sell
in the market for a drink.
The villain's claw, the axe,
plays on and on!

The eyes of the blazing sun
shoot rays of fiery fury!
June clouds hunt for drinking water!
December nights hunt for cold!
April dawns hunt for a tiny flower!
Sylvan rivers hunt for swirling currents!
The rhythm of creation is shattered.
The wheels of the chariot of life
are stuck on their course.
All I have, Mother mine,
are your sweet memories!
.....
As an outcast with bowed, shaven head
you trudge along the solar highway
carrying the bundle of your shame,

weighed down with the sin
of having borne children
who turned mother-ravishers,
with your mind consumed,
doesn't cruel death
creep in through your veins...?

Mother Earth, still alive!
This is your requiem!
This song I inscribe in my heart today
is a requiem to you (and to me)!

I won't be here to wet your dead lips,
to mourn your death.
Therefore,
I inscribe just this much here:
O Mother Earth,
in the imminence of your death,
may your soul rest in peace!
In eternal peace! "

17. In the background of the environmental concerns of the mankind and the decisions of the courts concerning the same, we feel that the claim of the petitioner about his absolute right to remove the ordinary earth has to be considered. It is true, normally, a citizen is free to do anything not expressly prohibited by law. In this case, there is no law, restricting removal of ordinary earth. But, the principle of customary international law concerning sustainable development, which is now part of the municipal law, as held by the Apex Court in **Vellore Citizens' Welfare Forum** [(1996)5 SCC 647, Para 15), which is quoted in para 14 of

this judgment) will clog the right of the petitioner. We also feel that the right to have a pollution free environment, flowing from the rights under Article 21 of the Constitution of India of the local people will act as a fetter on the rights of the petitioner. One of us had occasion to consider a similar contention in **Soman v. Geologist** [2004(3) KLT 577]. In that case, when licence to mine ordinary sand was granted by the Geologist, he imposed certain conditions, such as no quarrying shall be done within 75 metres of railway line and 50 metres of public road, water course, residential building, boundary wall of place of worship, burial grounds or burning ghats, except in accordance with the permission of the State Government or the competent authority. Another condition imposed was that no dewatering of the mine pit using pump is permissible and mining should be done manually. The petitioner therein attacked those conditions on the ground that the Kerala Minor Mineral Concession Rules, 1967 do not empower the Geologist to impose such conditions. In the said decision, it was held as follows:

> "13. In view of the above and other judgments, the principle of sustainable development and the doctrines of 'polluter pays' and 'precautionary principle' are part of our environmental law, which is built around Art.21 of Constitution of India. The conditions impugned in this Writ Petition are necessary to protect the environment. If every land owner, driven by profit motive, is to dig his land to win sand,

> no land except pits will be left for the future generations. So, the petitioners should stop mining, when it reaches the ground water level and immediately all the pits should be filled up, as provided in condition No.16, which reads as follows:
>
> 'All excavations have to be immediately filled and reclaimed.'
>
> The principle of sustainable development, now being part of the environmental jurisprudence, flowing from Art.21 of the Constitution of India, the State is bound to impose the impugned conditions, while granting the permit. Even if such conditions are omitted to be mentioned in the Kerala Minor Mineral Concession Rules, still the State can impose them, in view of Art.21 of the Constitution of India. In other words, even if condition Nos.2 and 15 are unauthorised by the Rules, they are authorised by Art.21. Accordingly, the challenge against condition Nos.2 and 15 in Ext.P1 is repelled."

A Division Bench of this Court has approved the above decision in **Biju Chacko & Others v. The Dy. Director, Mining & Geology** [2006(1) KLJ 401]. The Division Bench in the said decision held as follows:

> "4. .....So far as this case is concerned objection is raised by the people of the locality. Facts would indicate that residential houses are situated within 45 metres. The conditions imposed for granting licence state that no quarrying shall be done within 75 metres of Railway line and 50 metres of public road, water source, residential building, boundary wall of place of worship, burial grounds or burning ghats, except under and in accordance with the previous permission of the State Government or competent authority. In fact the above mentioned condition was challenged before this Court in *Soman v. Geologist* [2004(3) KLT 577], contending that those conditions are unauthorised by the provisions of the Kerala Minor Mineral Concession Rules, 1967. Learned

> Single Judge repelled the contention and held that the rights of the people of the locality to have a decent environment, flowing from Art.21 of the Constitution of India, will save the restrictions imposed. We are also in agreement with the learned Judge. That being the situation we find no reason to interfere with the order passed by the Geologist."

In view of the above legal position, absence of any Act or Rules restricting removal of ordinary earth will not help the petitioner. His claim for the removal of ordinary earth is always subject to the rights of his neighbours, flowing from Article 21. The decision relied on by the learned counsel for the petitioner in **Sivadas v. Geologist, Mining and Geology Department** [(2003(2) KLT 312] has no application to the present case. The point which arose for decision in that case was the validity of the condition imposed by the Tahsildar in the possession certificate issued by him regarding the period during which the mining should be done. The learned single Judge held that only the Geologist can fix the period, for mining ordinary sand.

18. In the context of the profound issues involved concerning the impact of removal of ordinary earth, police protection cannot be granted to the petitioner for the mere asking of it. Now-a-days, a writ petition for police protection is filed as if it is a suit. The petitioner mentions his right and states about the infringement or attempted infringement of it by the party respondents. This Court is expected to adjudicate their rival claims

and on establishing the right of the petitioner, order the police to help him to exercise or assert his right. We are of the view that the said approach sought to be introduced and established in the police protection jurisdiction is unacceptable. While hearing an application for police protection, this Court is exercising its power under Article 226 of the Constitution of India to issue a writ of mandamus. This Court's power to issue a writ of mandamus to the police is co-terminus with the duties of the police. If there is a failure of duty from the part of the police, this Court will remedy that. In this case, the police have no power or authority to adjudicate on the competing claims of the land owner/his assignee and of the persons in the locality. It is a complex issue and the police cannot be conferred jurisdiction to adjudicate the issue and to render protection to the person, whose right is upheld by them. If the police have no duty to adjudicate the rights of the parties, this Court also cannot do that in this police protection jurisdiction, where, as we have stated earlier, this Court is concerned only with the failure of duty from the part of the police and the consequential remedial action. The competing claims between the proprietary right of the petitioner and the rights of the persons of the locality under the concept of sustainable development and Article 21 of the Constitution can only be adjudicated by the competent civil court. If the competent civil court finds that the

petitioner is entitled to remove earth without infringing the rights of the neighbours in the locality, it can injunct them from obstructing the petitioner. It can also address the police, if necessary, to render protection to enforce its orders. So, the civil court, which is authorised to decide any civil dispute between the parties, can effectively resolve this question. As mentioned earlier, this writ petition is not a suit and therefore, this Court cannot adjudicate on the rights of the parties. This Court is only concerned with the failure of duty from the part of the police. Therefore, the petitioner is not entitled to get a direction for police protection as claimed by him. Accordingly, the writ petition is dismissed. No costs.

K.BALAKRISHNAN NAIR, JUDGE.

T.R.RAMACHANDRAN NAIR, JUDGE.

Nm/